Supreme Court, U.S.
FILED

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No.

In the
Supreme Court of the United States

DR. DONALD C. AUSTIN,

Petitioner,

vs.

AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a private association of neurological surgeons impermissibly interferes with the judicial system by punishing its members for giving admissible expert testimony in medical malpractice cases pursuant to a process whereby only doctors who testify for plaintiffs will be punished.

Whether a private association of neurological surgeons impermissibly interferes with the judicial system by punishing its members for giving admissible expert testimony in medical malpractice cases.

Whether a private association impermissibly interferes with the judicial system by punishing its members for giving admissible expert testimony.

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The district court's decision denying respondent's motion to dismiss is reported at 47 F. Supp. 2d 941. The district court's decision granting respondent's motion for summary judgment is reported at 120 F. Supp. 2d 1151. The circuit court's decision affirming the district court is reported at 253 F.3d 967.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2001. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case arises out of the respondent's punishment of Dr. Donald C. Austin ("Dr. Austin") for having testified as an expert witness for the plaintiff in a medical malpractice case.

Dr. Austin, a practicing neurosurgeon since 1963, was a member in good standing of the American Association of Neurological Surgeons ("AANS") for 33 years. In 1996, his membership was suspended because the AANS' Board of Directors determined that his testimony as an expert witness in a medical malpractice case violated the AANS' Code of Ethics and Expert Witness Guidelines.

In 1994, Dr. Austin testified as an expert witness for the plaintiff in the medical malpractice case of *Patricia Ayers v. Dr. Q. Michael Ditmore*, No. 93-4333-CV-C-66BA, in the United States District Court for the Western District of Missouri. The jury verdict in that case was for the defendant, Dr. Ditmore.

Following that trial, Dr. Ditmore filed charges against Dr. Austin with the AANS, contending that Dr. Austin's testimony violated the AANS' Expert Witness Guidelines. The AANS' Professional Conduct Committee found that Dr. Austin's testimony in the malpractice case was "unsupported by literature or logic,"[1] and recommended to the Board that Dr. Austin's membership be suspended. The Board adopted this recommendation.[2]

The effect of this suspension on Dr. Austin was dramatic and immediate. Prior to his suspension, Dr. Austin had earned an average of $220,000 per year from testifying as an expert witness in malpractice cases. Since the Association's actions, Dr. Austin has earned less than half that amount. In fact, several of the lawyers who used to hire Dr. Austin have willingly stated that their reason for no longer calling Dr. Austin was that he was sanctioned by the Association.

Dr. Austin sued in the United States District Court for the Northern District of Illinois, contending that his suspension by the AANS violated Illinois law, under which an association in which membership is an "important economic interest" may not discipline or discharge

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[1] Dr. Austin testified that the particular injury Ms. Ayers suffered could not have occurred without negligence. The AANS found Dr. Austin's testimony was unsupported by the medical literature, even though the defendant's expert in the malpractice trial conceded that the medical literature implied that Dr. Austin's testimony was correct. In the instant case, the only medical expert witness disclosed in pre-trial proceedings opined that Dr. Austin's testimony was correct.

[2] Dr. Austin has never contended that the procedures the AANS followed were unfair or inadequate.

a member without according the member due process, in violation of the association's bylaws, or contrary to public policy. *See, e.g., Van Daele v. Vinci*, 51 Ill. 2d 389, 393, 282 N.E.2d 728, 731 (1972) (overturning the expulsion of members of a independent grocers' cooperative because "there are too many factors indicating that the proceedings were in fact not good faith disciplinary hearings, but in reality, an attempt to silence and censure dissident members of the association.") The district court denied respondent's motion to dismiss for failure to state a claim, (*infra*, App. 24) but later granted respondent's motion for summary judgment. (*infra*, App. 15.)

When considering the AANS' Motion for Summary Judgment, the district court was presented with unrebutted evidence that the Expert Witness Guidelines under which Dr. Austin was punished were established by the AANS for the purpose of manipulating the manner in which the judicial system was handling medical malpractice cases. In 1976, the AANS' Professional Liability Committee studied what it termed an "epidemic" in the American medical malpractice liability system, the principal "symptom" of which was too many malpractice verdicts against neurosurgeons. According to the Professional Liability Company's report:

> the courts have decided that virtually all adverse medical outcomes or injuries resulting from medical treatment ought to be compensated. In essence, the critical issue which determines compensability is not negligence but a poor result.

Professional Liability Committee, American Association of Neurological Surgeons, *Proposed Standards for Testimony by Neurosurgeons Acting as Expert Witnesses*,

Journal of Neurosurgery, Aug. 1976, at 240 (hereafter "*Professional Liability Committee*"). This epidemic, the Professional Liability Committee's report concluded, was responsible for all manner of ill effects: skyrocketing malpractice insurance rates; neurosurgeons leaving the profession prematurely; extra tests and procedures ordered because of liability concerns, not because they were medically indicated; and the general demise of the doctor-patient relationship.

While the Professional Liability Committee's report acknowledged that neurosurgeons who performed badly were at least partly responsible for the problem, the solution it offered did not address this problem. Rather, it established expert witness rules and a procedure for enforcing those rules that was designed to appear even-handed and sensible, which in reality would only be applied to chill expert witness testimony on behalf of plaintiffs.

The Expert Witness Guidelines required all AANS members testifying as expert witnesses to:

1. Become familiar with all pertinent data of the particular matter at issue.
2. Review prior and current concepts related to the standard of neurosurgical practice in the matter at issue.
3. Not concern himself with the legal issues of the matter in question.
4. Identify as such personal opinions not generally accepted by other neurosurgeons.

Professional Liability Committee, p. 240. In addition, the AANS' Code of Ethics requires an AANS member testifying as an expert witness to "thoroughly prepare him-

self or herself with relative facts" so he or she can present the court with "accurate and documentable" opinions.

The Expert Witness Guidelines and Code of Ethics are not merely aspirational or precatory language; under the AANS Bylaws, a member's violation of either is cause for censure, suspension or expulsion.

However, the AANS Bylaws provide that *only* an AANS *member* can file charges. In other words, only doctors can complain about the testimony of other doctors. A patient who lost a viable malpractice claim because of dishonest expert testimony by a defendant's expert has no recourse. This procedural rule ensures that these seemingly evenhanded rules would never be applied to testimony for a doctor *defending* a malpractice claim. After all, what doctor-member would have the motive or inclination to bring charges against a doctor-member who testified *for* a doctor-member? The only people with a motive to bring charges will be doctors who were offended by what a plaintiff's expert had opined. In fact, the AANS' 1997 Annual Report highlights the fact that "The Professional Conduct Committee [the AANS Committee charged with enforcing the Expert Witness Guidelines] continues to provide a resource to *members* who may have been aggrieved by another member of the association in a tort proceeding."

Not surprisingly, all prosecutions under the Expert Witness Guidelines have been brought against a malpractice plaintiff's expert witness. No defendant's expert has ever been charged.

In granting the AANS' motion for summary judgment, the district court first concluded that Dr. Austin had presented sufficient evidence to show that membership

in the AANS significantly affected an important economic interest, causing him to lose hundreds of thousands of dollars in income. The fact that Dr. Austin was still able to earn a living was irrelevant, since a member of a private association "need not show that he will be rendered homeless or even driven to bankruptcy by its unfair action that caused him significant economic harm." (*infra*, App. 18.)

After finding that Dr. Austin had not been deprived of due process in his AANS disciplinary hearing (a point which Dr. Austin has never disputed), the district court determined that he had not shown that the AANS' decision was biased or in bad faith.

The district court did not reach the central issue in this case—whether the AANS' Expert Witness Guidelines violate public policy by discouraging members from testifying for plaintiffs in medical malpractice cases. Rather, it concluded that "there is no Illinois law giving a court power over the disciplinary decisions of a private association merely because they violate . . . public policy." (*infra*, App. 22.)

The court of appeals affirmed the district court. Writing for the court, Judge Posner correctly noted that Illinois law requires a court to overturn the disciplinary actions of a private association if they violate public policy. (*infra*, App. 3.) Yet Judge Posner decided that Dr. Austin's testimony was irresponsible, and that the AANS therefore did not violate public policy in punishing him for giving it.

Judge Posner held, without citing authority, that the AANS' Expert Witness Rules did not interfere with the judicial system, but actually furthered the cause of justice by exposing "shoddy" expert testimony.

> It is no answer that judges can be trusted to keep out such testimony. Judges are not experts in any field except law. Much escapes us, especially in a highly technical field, such as neurosurgery.[3]
>
> The *Daubert* rule, it is true, requires judges to screen proposed expert witnesses carefully to make sure that their testimony will be responsible. . . . Judges need the help of professional associations in screening experts.

(*infra*, App. 9-10.)

REASONS FOR GRANTING THE PETITION

This court should issue its writ of certiorari because the circuit court's decision: (a) overturns (without comment or analysis) hundreds of years of common law precedent preserving the integrity of the judicial system by protecting witnesses from the threat of retaliation for their court testimony; (b) sets a precedent that will dramatically tilt the playing field in medical malpractice cases in favor of defendants by creating a disciplinary system that will chill doctors' willingness to testify as expert witnesses for plaintiffs in medical malpractice cases; and (c) effectively overrules *Daubert v. Merrill Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) by allowing professional associations, not trial judges, to estab-

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[3] Judge Posner's opinion belies the idea that judges need this help. Judge Posner conducted his own medical research, cited authorities in his opinion which neither side in this case cited or discussed, and concluded that Dr. Austin's testimony was "irresponsible."

lish rules that will govern the admissibility of expert testimony.

I. The Circuit Court Ignored Centuries of Common Law Precedent Protecting Witnesses from Punishment for their Testimony

As this court said in *Briscoe v. LaHue*, 460 U.S. 325, 332-34 (1983):

> In the words of one 19th-century court, in damages suits against witnesses, "the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." *Calkins v. Sumner*, 13 Wis. 193, 197 (1860). A witness' apprehension of subsequent damages liability might induce two forms of self-censorship. First, witnesses might be reluctant to come forward to testify. See *Henderson v. Broomhead*, *supra*, at 578-579, 157 Eng. Rep., at 968. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability. See *Barnes v. McCrate*, 32 Me. 442, 446-447 (1851). Even within the constraints of the witness' oath there may be various ways to give an account or to state an opinion. These alternatives may be more or less detailed and may differ in emphasis and certainty. A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and

> undistorted evidence. See Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 Colum. L. Rev. 463, 470 (1909). But the truth-finding process is better served if the witness' testimony is submitted to "the crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies." *Imbler v. Pachtman*, 424 U.S. 409, 440 (1976) (WHITE, J., concurring in judgment).

These 300 year old insights, which the common law has used to protect our judicial system from manipulation, are threatened by the result of this case.

For hundreds of years, the common law has protected the integrity of the judicial system by protecting witnesses from the fear or threat of retribution for their testimony. In addition to the absolute privilege that protects a witness from the threat of civil liability for his testimony, the law protects the integrity of the judicial system by making it both a high crime and a civil wrong to attempt to influence a witness. In Blackstone's day, "to endeavour to dissuade a witness from giving evidence" was a high misprision, one step below a capital crime. 4 William Blackstone, *Commentaries on the Law of England* *126. *See also* 18 U.S.C. § 1512, under which anyone who "knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person" to influence or prevent that person's testimony, is guilty of the crime of witness tampering; *and* 42 U.S.C. § 1985(2), making it a civil wrong for two or more people to "conspire to deter, by force, intimidation, or threat, any party or witness in

any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified."

In *Briscoe*, a case that clearly illustrates the importance of the policy of protecting witnesses from intimidation, the Court held that the absolute testimonial privilege protected even a police officer who had perjured himself to obtain a conviction. *Briscoe* did this not to encourage perjury (which itself interferes with the judicial system) but because allowing even one perjurer to face the threat of liability for his testimony would set a precedent that would deprive the judicial system of honest testimony, by making even honest witnesses testify guardedly with the fear of their own potential liability in mind.

Though *Briscoe* was concerned with civil liability, the ability of a system of "professional discipline" to chill admissible testimony is in many cases (such as this one) even greater than the threat of damages liability. Dr. Ditmore could not have sued Dr. Austin for damages. But, even if such a suit could have been brought, Dr. Ditmore's damages (and thus his threat to Dr. Austin) would have been minimal, since Dr. Ditmore won the malpractice trial. But, the AANS' "professional discipline" offered Dr. Ditmore a greater weapon for revenge; the sanction it imposed cost Dr. Austin hundreds of thousands of dollars in lost income. It makes no difference that Dr. Austin's loss did not go directly into Dr. Ditmore's pocket, or into the coffers of the AANS—the chilling effect on Dr. Austin and all other physicians who would consider testifying for a plaintiff is greater than the threat of civil liability. The issue to a potential

witness is the potential harm to the witness, not the amount of some other party's gain.

Many cases have recognized that the threat of professional discipline is as effective a deterrent to court testimony, and thus as pernicious to the impartial administration of justice, as the threat of civil liability. Chief among them is *Bernstein v. Alameda-Contra Costa Medical Association*, 293 P.2d 862 (Cal. App. 1956), which is almost identical to Dr. Austin's case. A doctor, expelled from his medical association based on the association's finding that his court testimony violated the association's Principles of Medical Ethics, sued for reinstatement. The court reversed the expulsion, stating:

> If parties and witnesses were subject to slander and libel actions for utterances made or filed in a judicial proceeding the administration of justice would be hampered and the judicial process throttled. The same policy should ban a medical association by-law which holds over each of the members the threat of expulsion if in his testimony (oral or written) before a court or other judicial body he 'disparages, by comment or insinuation,' another physician. . . . It is inconceivable that the law could tolerate the holding of such a sword of Damocles over any medical witness in any judicial proceeding.

Id. at 865.

In *Konrad v. DeLong*, 57 F.R.D. 123 (N.D. Ill. 1972), the defendant in a medical malpractice case filed charges against the plaintiff's expert with his county medical society, alleging that the expert's report was "'unethical' . . . 'containing many untruths and not medically sound.'" The court ordered the defendant to with-

draw the charges and permanently enjoined him from filing any charges based on the expert's testimony in that case, holding that:

> Even if [the plaintiff's expert] appears as a witness, the threat of retribution inherent in these circumstances will tend to affect his capacity to state his opinions in his testimony without fear or favor. Defendant's conduct, therefore, has the effect of intimidating the witness and obstructing justice.

Id. at 124.

In *Meyer v. McDonnell*, 392 A.2d 1129 (Md. Ct. App. 1978), the court strongly condemned the actions of a defendant in a medical malpractice case who attempted to intimidate the plaintiff's expert witness by threatening to disseminate his testimony to the local medical societies:

> Whatever merit the medical profession may have in its current outcry against malpractice suits, the remedy does not lie in polluting the streams of justice by tampering with witnesses.

Id. at 1130.

Similarly, in *L'Orange v. Medical Protective Company*, 394 F.2d 57 (6th Cir. 1968), the court held that a malpractice insurer could not cancel a doctor's policy (which it had the contractual right to do) because the doctor had testified as a plaintiff's expert:

> If the insurance industry can use the cancellation procedure to keep members of the medical profession from testifying as witnesses, malpractice litigation can be stifled.

Judge Posner had no doubt that the AANS' enforcement of its Expert Witness Rules would have a chilling effect on expert witness testimony.

> The *Daubert* rule, it is true, requires judges to screen proposed expert witnesses carefully to make sure that their testimony will be responsible. . . . Judges need the help of professional societies in screening experts. . . . More policing of expert witnessing is required, not less.

(*infra*, App. 10-11.) But, rather than condemn the AANS for interfering with the judiciary, Judge Posner praised the AANS and encouraged others to follow its example.

It is difficult to understand how Judge Posner saw the AANS disciplinary proceeding "helping" a court. It clearly cannot help the court in which the expert testimony is given since, under the AANS rules, the malpractice case must be over before a disciplinary proceeding can begin. It also cannot help the court to be denied the expert testimony of the doctors who will inevitably be intimidated. How many doctors will avoid testifying for plaintiffs once they realized that they run the risk of being sanctioned (and thus losing substantial income) if an unelected trio of doctors, guided by no precedent and reviewable by no court, disagrees with their opinion. Furthermore, as Justice Breyer observed, Rule 706 of the Federal Rules of Evidence gives the district court the power to obtain all the help it needs by appointing its own expert, in addition to those hired by the parties. *General Electric* at 149-150 (Breyer, J., concurring).

The circuit court's decision stands over 300 years of history on its head by not only failing to condemn the AANS' punishment of Dr. Austin for his expert testimony, but praising the AANS' actions and encouraging

others to follow its example. This Court should grant the Petition for Writ of Certiorari to exercise its supervisory authority to correct this radical departure from centuries of well-reasoned precedent.

II. The Circuit Court's Decision Will Quickly and Dramatically Tilt the Playing Field in Medical Malpractice Litigation in Favor of Defendants

By allowing the AANS to establish rules governing expert testimony by its members, and to punish a member for giving honest expert testimony which a trial judge, applying *Daubert* admitted in evidence, the circuit court effectively has given the AANS, and every other medical society, the power to control medical malpractice litigation against doctors. If the precedential effect of this case were somehow limited to the AANS, or to neurosurgeons, its societal effects might not be so extreme. However, there is every reason to expect that the AANS' success will be applied quickly to all physicians in all medical specialties. The boards of medical associations and their self-appointed "Professional Conduct Committees" (all of whom are unelected by and unaccountable to the general public), will accomplish what the democratically-elected legislatures have chosen not to—their own version of "tort reform"—by cutting off or altering plaintiffs' expert medical testimony at the source.

First, it appears that other medical societies, emboldened by the circuit court's opinion, will likely follow the AANS' lead in enacting rules governing expert testimony by members, and threatening violators with severe sanctions. Recently, the American Medical Association, which represents all medical professionals, proposed ex-

pert witness rules similar to the AANS'.[4] In addition, the American Medical Association, Illinois State Medical Society, and the American College of Surgeons, filed an *amicus curiae* brief supporting the AANS' position in the circuit court, suggesting that they, too, plan to implement similar rules.[5]

Second, without review by this Court, the circuit court's decision likely will have a wider geographic impact than the territory within the Seventh Circuit. Since many of the leading medical societies in the United States are based in Chicago, litigation challenging their expert witness rules will most likely take place in Chicago, where the circuit court's decision is binding precedent.[6] Furthermore, as a recent opinion by a

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[4] Michael Higgins, *Docking Doctors? AMA eyes discipline for physicians giving 'false' testimony*, ABA Journal, Sept. 1998, at 20.

[5] The American Academy of Orthopaedic Surgeons sought leave to file an *amicus* brief as well, but its request was denied as untimely.

[6] Even if litigation challenging the Expert Witness Guidelines of the AANS, or of another Chicago-based medical society, were commenced elsewhere, it likely would be transferred to the Northern District of Illinois pursuant to 28 U.S.C. § 1404(a). For example, in *Lustgarten v. American Association of Neurological Surgeons*, No. CV 201-55 (S.D. Ga. filed April 4, 2001), plaintiff, an AANS member against whom disciplinary charges had been filed for his testimony as a plaintiff's expert, sued to challenge the validity of the AANS' Expert Witness Guidelines. On June 7, 2001, the court granted the AANS' motion to transfer venue to the United States District Court for the Northern District of Illinois.

(continued...)

prominent appellate judge directly addressing the issue of whether a medical society may punish a member for giving honest, admissible expert testimony, the circuit court's decision is likely to be followed whenever this issue arises outside of the Seventh Circuit.

It requires no great insight to see—as did the courts in *Bernstein*, *Konrad*, *Meyer* and *L'Orange*, *supra*—that allowing medical societies free reign to punish members for testifying as plaintiff's experts will give the societies total control over medical malpractice litigation, since it is impossible for a plaintiff to prove malpractice without expert testimony.[7] Even before this case it had been difficult to find a physician willing to testify as a plaintiff's expert. For decades, the plaintiffs' bar has railed against the "conspiracy of silence"—the near-universal refusal of members of the medical profession to accuse a fellow doctor of negligence. Even outside of the legal arena, the medical profession has been notoriously lax at self-policing. Atul Gawande, *When Good Doctors Go Bad*, New Yorker, Aug. 7, 2000, at 60.

> There's an official line about how the medical profession is supposed to deal with [bad doctors]: colleagues are expected to join forces promptly to remove them from practice and report them to the medical-licensing authorities, who, in turn, are supposed to discipline them or expel them

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[6] (...continued)
Lustgarten v. American Association of Neurological Surgeons, No. CV 201-55 (S.D. Ga. June 7, 2001).

[7] In some states, such as Illinois, a plaintiff cannot even *file* a malpractice complaint without a written expert opinion that the defendant was guilty of malpractice. 735 ILCS 5/2-622.

> from the profession. It hardly ever happens that way. Marilynn Rosenthal, a sociologist at the University of Michigan . . . gathered data on what happened in more than two hundred specific cases . . . and nearly everywhere she looked she found the same thing. It was a matter of months, even years, before colleagues took effective action against a bad doctor, however dangerous his or her conduct might have been.

Id. at 63.

The AANS' rules give the medical profession a tailor-made enforcement mechanism for its conspiracy of silence. Many more physicians will be deterred from testifying as plaintiffs' experts by the threat of severe economic sanctions. Those few doctors who are still willing to testify will be "brought up on charges," having their testimony labeled "irresponsible," and, like Dr. Austin, vulnerable to the prospect of being prevented from again being considered as expert witnesses.

III. The Circuit Court Virtually Overruled *Daubert*

In *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co., Ltd. v. Carmichael*, No. 526 U.S. 137 (1999), this Court has repeatedly reaffirmed that it is the role of the trial judge—subject only to review under the most deferential abuse of discretion standard—to determine what expert testimony is admissible in evidence.

By allowing the AANS to establish its own standards, apply those standards only to testimony which a trial court, applying *Daubert*, already has held admissible,

and mete out its own punishment for admissible testimony that it determines violates those standards, and by encouraging other medical societies to do likewise, the circuit court has effectively overruled *Daubert*.

In *Daubert*, the Court held that Rule 702 of the Federal Rules of Evidence supplanted the *Frye* rule, under which expert testimony was inadmissible unless the basis of the testimony was "sufficiently established to have gained general acceptance in the particular field to which it belongs." *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). This Court held that "a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion testimony."' . . . [*Frye*'s] austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials." *Id.* at 588-89. Instead, *Daubert* held that Rule 702 requires the trial judge to determine—essentially on a case-by-case basis for each proffer of expert testimony—whether "the reasoning or methodology underlying the testimony is scientifically valid, and . . . whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93.

The AANS' standards are inconsistent with *Daubert*. The AANS' Code of Ethics prohibits its members from rendering any expert opinion that is not both accurate and "documentable", that is, "supported by peer-reviewed literature." If an opinion is not found in the medical literature, no AANS member may express it in court.

However, *Daubert* forbids such a blanket rule. This Court warned that an opinion may not be published in

the relevant literature for any number of reasons that have nothing to do with its scientific validity—it may be too new, too esoteric, or of so limited interest to the scientific community that nobody has bothered to write on that particular issue. *Id.* at 593-94. Under *Daubert*, the presence or absence of published literature supporting an expert's opinion is but one factor that the trial court may consider (or, following *Kumho Tire*, may choose not to consider) in deciding whether to admit the testimony. But, if the AANS' disciplinary system is allowed to continue, it will be the *sine qua non* of admissibility for plaintiffs' experts. Defendants' experts, on the other hand, who are not exposed to AANS discipline, will be free to testify under the broad rules of *Daubert*. Judge Posner unwittingly allowed the AANS to re-establish "general acceptance" as the standard for the admissibility of expert testimony.

The Court rejected the argument that "abandonment of 'general acceptance' as the exclusive requirement for admission will result in a 'free-for-all' in which befuddled juries are confounded by absurd and irrational pseudo-scientific assertions." In the first instance, *Daubert* requires trial judges to make a preliminary assessment of the scientific validity of any proffered expert testimony—a task which the Court was "confident" federal judges were capable to perform. The Court also noted, in language reminiscent of Mr. Justice Stevens in *Briscoe*:

> Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. Additionally, in the event the trial court concludes that the scintilla of evidence presented supporting a proposition is insufficient

> to allow a reasonable juror to conclude that the proposition more likely than not is true, the court remains free to direct a judgment, and likewise to grant summary judgment.

Id. at 596 (internal citations omitted).

Two later cases, in both of which the Court affirmed the district court's decision on the admissibility of proposed expert testimony, highlight the autonomy which *Daubert* confers on the district court performing its gatekeeping function. In *General Electric*, the Court held that a district court's decision to admit or exclude expert testimony is reviewable only under the abuse of discretion standard. In *Kumho Tire*, the Court held that: (a) *Daubert* applies to all expert testimony, not merely "scientific" testimony; and (b) the abuse of discretion standard applies "as much to the trial court's decisions about how to determine reliability [of proposed expert testimony] as to its ultimate conclusion [whether to admit or exclude the testimony.]" *Id.* at 152.

By allowing private associations to punish a witness for giving expert testimony that a court, applying *Daubert*, held was sufficiently reliable to help the trier of fact, Judge Posner invites associations to impose their own, more restrictive, standards for expert testimony. The mere threat of "professional discipline" will cause many witnesses to conform to the more restrictive standard in order to avoid punishment, thus depriving the court system of testimony it would consider helpful to the trier of fact. This is especially heinous since the AANS' rules will only be applied against plaintiff's experts.

CONCLUSION

For the foregoing reasons, this Court should issue its writ of certiorari to review the judgment of the Seventh Circuit.

Respectfully submitted,

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